No. 89-1375

In The

Supreme Court of the United States

October Term, 1989

BP EXPLORATION (ALASKA) INC., EXXON CORPORATION, and CHEVRON U.S.A. INC.,

Petitioners,

vs.

DOUGLAS B. BAILY, ATTORNEY GENERAL OF THE STATE OF ALASKA, LENNIE BOSTON-GORSUCH, COMMISSIONER OF NATURAL RESOURCES OF THE STATE OF ALASKA, GARY GUSTAFSON, DIRECTOR OF THE DIVISION OF LANDS, JAMES E. EASON, DIRECTOR OF THE DIVISION OF OIL AND GAS, and WALTER L. CARPENETI, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ALASKA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

May a party to a state court lawsuit bypass available state court procedures and seek the disqualification of state court judges and jurors by filing a lawsuit in federal court under 42 U.S.C. § 1983?

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I. STATEMENT OF THE CASE

A. Introduction

This petition arises out of a § 1983 lawsuit filed by Petitioners to enjoin the continued litigation of a state court lawsuit – *State of Alaska v. Amerada Hess Corp., et al.*, 1JU-77-847 Civil ("*Amerada Hess*") – in any court (state or federal) located in Alaska. Petitioners are defendants in *Amerada Hess*, a suit filed by the State of Alaska to recover royalties owing under oil and gas production leases. The crux of Petitioners' claim is that trial of *Amerada Hess* in Alaska will violate their due process right to a fair trial because the judge and all of the jurors will allegedly have a financial interest in the outcome of that trial by virtue of their right to apply for annual dividends under the Alaska Permanent Fund Dividend Program, dividends which might be increased if the State recovers the money damages it seeks in *Amerada Hess*.

The district court denied Petitioners' request for an injunction on ripeness grounds, ruling that Petitioners were obligated to raise their due process claim in the state court before asserting it in federal court. The Ninth Circuit Court of Appeals affirmed this ruling in a unanimous decision.

By their petition, Petitioners seek to establish an unprecedented rule of federal court interference with pending state court proceedings. In effect, Petitioners are attempting to utilize § 1983 as a means of securing an interlocutory ruling from a federal court on a constitutional issue arising in a state court lawsuit. That statute,

however, has never been construed by this Court to permit such an intrusion in an ongoing state court proceeding, and due regard for proper federal/state relations requires that § 1983 not be so construed. The petition for writ of certiorari should be denied.

B. Statement of the Facts

1. The Alaska Permanent Fund Dividend Program

Approximately 1.7 million barrels of crude oil and condensate are taken each day from the Prudhoe Bay and Kuparuk River oil fields located on the North Slope (the Arctic coast) of Alaska. Through 1986, production from these fields exceeded 5.2 billion barrels; it is anticipated that these two fields will ultimately yield a total of 10.7 billion barrels. With roughly 80 percent of the state government's general fund revenues coming from the taxes and royalties derived from the production of oil, oil constitutes the backbone of Alaska's governmental finances.

In view of the nonrenewable nature of this vital state resource, the Alaska Constitution was amended in 1976 to create a Permanent Fund. Alaska Const. art. IX, § 15. In its simplest terms, the Permanent Fund is a public savings and investment account; its purpose is to preserve for future generations a fair portion of the income derived from the production of Alaska's oil and to provide a source of state revenue once the oil runs out. *Williams v. Zobel*, 619 P.2d 448, 453 (Alaska 1980), *rev'd on other grounds*, 457 U.S. 55 (1982). At least 25 percent of all mineral royalties received by the State must be placed in the Permanent Fund and invested; all income from that

investment must be deposited in the State's general fund unless otherwise provided by law. Alaska Const. art. IX, § 15.

In 1982, the Alaska Legislature passed such a law and created the Permanent Fund Dividend Program. Alaska Stat. §§ 43.23.005-095. Under that program every Alaska resident *who applies* may receive an annual dividend funded from the earnings on Permanent Fund investments. The amount of each year's dividend under this statutory program is determined in accordance with a fixed formula. The amount of the 1989 Permanent Fund dividend was $873.16.

2. *Amerada Hess.*

In 1977, the State of Alaska filed the *Amerada Hess* lawsuit in Alaska Superior Court against eighteen North Slope oil producers, including Petitioners in this case. In that suit, the State seeks a declaration of its rights under certain oil and gas leases which it had entered with the oil producer defendants, and it seeks damages for the alleged underpayment of royalties under those leases.

Subsequently, there has been extensive discovery, during which the parties have attempted to account for the disposition of every barrel of oil produced on the North Slope between 1977 and 1986. The State's experts have valued its claims against all producers at about $900 million (including interest). The trial date has been postponed repeatedly and is currently slated to begin no earlier than April 2, 1991.

3. The Proceedings Below.

On November 2, 1987 – the day before the parties were to meet with the state court to schedule *Amerada Hess* for trial and more than five years after the creation of the dividend program giving rise to their due process claim – Petitioners filed the underlying lawsuit in the United States District Court for the District of Alaska. Brought under 42 U.S.C. § 1983, this suit is founded on Petitioners' claim that trial of *Amerada Hess* in any court in Alaska would violate their due process rights to a fair trial under the Fourteenth Amendment to the United States Constitution. Petitioners claim that the judge and all of the jurors will have a financial interest in the outcome of the case by reason of their annual Permanent Fund dividends, which would be increased as a result of a State victory in *Amerada Hess*. More precisely Petitioners allege that, if the State recovers all the damages it seeks in *Amerada Hess*, each year's dividend would initially be increased by approximately $45 and this figure would ultimately rise to around $70 as the remainder of the North Slope oil is recovered from the ground.[1]

Subsequent to the filing of Petitioners' complaint, the state officials, except for Judge Carpeneti[2], moved to

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[1] Given the procedural context of this case, Petitioners' factual allegations were accepted as true. As a matter of actual fact, however, many of Petitioners' allegations may not be accurate. [*See* Footnote 14, *infra*.]

[2] Represented by separate counsel, Judge Carpeneti renounced an active role in this case, agreeing to be bound by the result.

dismiss the action on four grounds, including two relevant here: that abstention was appropriate under *Younger v. Harris*, 401 U.S. 37 (1971), and that the case was not ripe for federal court determination. The district court did not reach the abstention issue and dismissed the action only on ripeness grounds, finding that "the case is not ripe for review because we do not know that Alaska cannot provide a fair forum." [App. to Petition, at A-17.]

Petitioners appealed to the Court of Appeals for the Ninth Circuit, claiming that the district court erred in dismissing the case for lack of ripeness. Respondents cross-appealed, claiming that the case should also have been dismissed on both Eleventh Amendment and abstention grounds.

The court of appeals affirmed, holding that the federal action was not ripe. The court noted that Petitioners had made no effect to utilize available state court procedures to assert their due process/disqualification claim, and the court found no basis for concluding that the available procedures would be inadequate to resolve the issue. [*Id.* at A-9.] The court further found that a prompt due process challenge in the state court could well result in a ruling in Petitioners' favor.[3] [*Id.* at A-10.] "Such a ruling would eliminate the federal constitutional claim without federal court interference and avoid a needless

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[3] This finding is supported by the fact that the district court judge originally assigned to this case (Judge Andrew J. Kleinfeld) disqualified himself pursuant to a motion by Petitioners on the very grounds asserted as the basis for this § 1983 action.

conflict in this nation's dual court system."[4] [*Id.* at A-10 to A-11.]

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[4] Besides affording the state court the opportunity to obviate the need for federal court interference, the court's ruling also gave the state court the opportunity to develop a record to resolve uncertain factual issues. [*Id.* at A-10.] These issues include:

a. Do all judges receive the Permanent Fund dividend? While most Alaskans apply for dividends, all do not. There has been no determination that any Alaska state court judge receives the dividend.

b. In the event that all judges currently apply for and receive the dividend, are there any who would waive such benefits to provide a forum?

c. What is the financial interest at stake? *See* Part II.B., *infra*.

d. Does the alleged financial interest rise to the level of constitutional significance? As discussed below in Part II.B., only substantial interests can support a due process claim. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

e. Does the Alaska Legislature's recent amendment to the statutory dividend program, which precludes the payment of dividends based on income earned from any damages awarded in *Amerada Hess*, eliminate the basis for Petitioners' due process claim? *See* Alaska Stat. § 43.23.045(b), quoted at footnote 15, *infra*.

f. Is there another forum in which *Amerada Hess* could be tried? Petitioners claim that their intent is not to prevent the State from pursuing its claims, but only to require that it do so in "an alternative, disinterested forum . . . such as the court of another state." [Petition at 6.] However, statute of limitations objections could bar the State from adjudicating a major

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II. REASONS FOR DENYING WRIT

Petitioners' case for certiorari is premised upon two claims: first, that the case has "broad implications for the entire range of federal constitutional and civil rights litigation," and second, that the case involves Petitioners' important due process right to a fair forum. [Petition at 10.] Properly viewed, neither of these claims provides sufficient justification for the exercise of this Court's discretionary jurisdiction.

A. This Case has no "Broad Implications" Sufficient to Justify a Grant of Certiorari.

Any case which raises questions regarding the proper relationship between state and federal courts carries the potential for broad impact. To justify a grant of certiorari, however, Petitioners must demonstrate a true need for this Court's involvement in the particular issues raised. Petitioners cannot carry that burden in this case.

As a general rule, § 1983 does not grant federal courts jurisdiction to intervene in pending state court

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portion of its claims in another state's courts. Additionally, there may be no forum that has personal jurisdiction over all of the defendants. Even if there were such a forum, the burden of trying a case like *Amerada Hess* could lead to dismissal on the basis of the inconvenient forum doctrine or for lack of time and space for trial of a matter of essentially local interest to Alaska. If the State were effectively barred from trying *Amerada Hess* in another forum, the rule of necessity may well apply to require trial in Alaska state court. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *United States v. Will*, 449 U.S. 200 (1980).

proceedings to rule piecemeal on federal constitutional issues which may happen to arise in the course of those proceedings.[5] Rather, parties are required to avail themselves of state court procedures to litigate their constitutional claims. Should those claims be denied, the appropriate avenue of federal court review and relief is appeal to this Court following judgment. *See* 28 U.S.C. § 1257.

> Proceedings in state court should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the appellate courts and ultimately this Court.

Atlantic Coast Line R.R. Co. v. Brotherhood of Loc. Eng., 398 U.S. 281, 287 (1970).

In this case, the question for this Court is whether there is something sufficiently special about a due process challenge seeking the disqualification of a judge (or juror) to justify the creation of a new rule of law which

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[5] In *Allen v. McCurry*, 449 U.S. 90, 100-01 (1980), this Court stated,

> In reviewing the legislative history of § 1983 in *Monroe v. Pape* . . . the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. [Citation omitted.]

As will be elaborated below, the state court procedures available here are adequate, both in theory and practice, to permit full litigation of Petitioners' due process claim.

would permit a litigant to bypass available state court procedures and seek a decision in the first instance directly from a federal court. The answer is no.

While the alleged financial interest at issue in this case arises by virtue of a unique program, Petitioners' due process claim is essentially indistinguishable from the myriad disqualification claims which arise routinely in many state court cases. Sound policy requires that such claims be litigated in the state courts. Otherwise, § 1983 would be transformed into a vehicle allowing unprecedented interference with pending state court proceedings, and the federal courts would be opened to a flood of lawsuits, the sole purpose of which would be to seek the disqualification, of state court judges. In view of these considerations, the district court acted appropriately in dismissing Petitioners' complaint, and no justification exists for granting the instant petition.

1. The court of appeals' ripeness ruling is consistent with federal case law.

Petitioners have criticized the court of appeals' decision in this case as lacking a "coherent theory" or "consistent rationale." [Petition at 8, 10.] Contrary to these assertions, however, the decisions of both the district court and the court of appeals are premised upon and consistent with well-established principles of justiciability and federalism. When confronted with the question of whether federal court intervention is appropriate to resolve a claim of state court bias, the lower federal courts have consistently required that the claim of bias be first presented to the state court for adjudication.

For example, in *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), a party to a bar disciplinary proceeding before the Nevada Supreme Court argued that federal court intervention was appropriate because the members of the Nevada court were biased. The court of appeals rejected this contention, stating, "Flangas may not simply ignore the disqualification procedures based upon his perception that his chances of success in disqualifying the biased judges 'are not auspicious.' " *Id.* at 950 (citation omitted).

A similar result was reached in *Dostert v. Neely*, 498 F.Supp. 1144 (S.D.W.V. 1980). Following the example of this Court in *Kugler v. Helfant*, 421 U.S. 117 (1975), which required resort to state disqualification procedures, the court abstained, stating,

> West Virginia's Judicial Code of Ethics, Canon 3, sets rigid standards for insuring the impartiality of judges. This court has every reason to believe that the Canon's strictures will be followed.

Id. at 1150. *Cf. Laird v. Tatum*, 409 U.S. 824, 833 (1972) (in which Mr. Justice Rehnquist ruled on a motion seeking his own disqualification, noting that disqualification is a matter of individual decision under the existing Court practice).

Peterson v. Sheran, 635 F.2d 1335 (8th Cir. 1980), is particularly instructive. There, a disbarred attorney brought a § 1983 action challenging the refusal of the justices of the Minnesota Supreme Court to reinstate him, alleging that they were biased against him. The court of appeals dismissed the case, stating, "The difficulty here is that the bias claim, unless first presented to the state court, does not reach constitutional ripeness." *Id.* at 1341.

The holdings of these cases are consistent with the general rule of ripeness which holds that when a challenge is made in federal court respecting the possibility that a government official might act in an unconstitutional manner, the court must first allow that official to act before assuming jurisdiction of a lawsuit premised on that act.[6] In conformity with this rule, cases have been dismissed where suit was brought only upon the basis of what a state court judge might do.

In *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976), the plaintiff brought a § 1983 action challenging the constitutionality of a durational residency requirement for divorce proceedings. Finding that the plaintiff had never asserted her constitutional claim in the state court, the Second Circuit dismissed her suit for lack of a justiciable case or controversy. The court reasoned that it could not predicate jurisdiction on the speculative assumption that the constitutional claim would be rejected if raised in the state court. *Id.* at 549.

Similarly, in *Cross v. Lucius*, 713 F.2d 153 (5th Cir. 1983), the plaintiffs sought equitable relief in a § 1983 action against Louisiana state court judges to prevent them from applying allegedly unconstitutional statutes of limitations. However, because the plaintiffs had not filed suit in state court, the federal court could only speculate as to whether the challenged statutes would actually be

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[6] Of course, where it is inevitable that the official will act so as to work a deprivation of constitutional rights, the aggrieved party need not await the consummation of that act before bringing an action. In this case, however, no such inevitability exists.

applied by the judges, and the action was dismissed for lack of case or controversy.

The holdings of these cases are buttressed by this Court's decision in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), which arose out of a federal court due process challenge by Texaco to a Texas law requiring the posting of an appeal bond. This Court held that Texaco's claim should have been dismissed, and though that holding was premised on abstention grounds rather than ripeness, the rationale of the Court's decision is applicable here. In part, this Court reasoned that, because the constitutional claims had never been asserted in the state court, it was "impossible to be certain" that Texas law actually gave rise to the claims alleged. *Id.* at 11.

Further, this Court specifically rejected the claim that the state court procedures were not adequate to afford a remedy on the constitutional claims. This Court stated,

> [D]enigrations of the procedural protections afforded by Texas law hardly come from Texaco with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case. . . . [W]hen a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.

Id. at 15. *See also Pulliam v. Allen*, 466 U.S. 522, 541 (1984) ("[i]t no longer is proper to assume that a state court will not act to prevent a federal court constitutional deprivation or that a state judge will be implicated in that deprivation"); *Peterson v. Sheran*, 635 F.2d at 1340 (rejecting a claim that it would be useless to request biased judges to

recuse themselves, "for it is a canon of judicial ethics that a judge must decline to hear a case if biased").

In conformity with these decisions, the courts below properly held that a state court denial of Petitioners' due process/disqualification claim is a necessary predicate to a ripened federal court cause of action. The authorities cited by Petitioners do not contradict this conclusion.

The leading case relied upon by Petitioners is *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). Petitioners argue that in that case this Court authorized federal intervention in a state optometry board proceeding where the board was "incompetent by reason of bias to adjudicate the issues pending before it." Petitioners, however, fail to note the narrow applicability of that decision. First, *Gibson* involved federal intervention to restrain the actions of a state administrative body. No federal court has expanded upon the *Gibson* rationale to permit interference with state judiciaries.

Second, in *Gibson* there was no indication that there was even any procedure available to challenge the members of the optometry board for bias.[7] *See Flangas v. State Bar of Nevada*, 655 F.2d at 950. Further, as recognized in *Partington v. Gedan*, 880 F.2d 116, 126 n.4 (9th Cir. 1989), even if a procedure was available in *Gibson* for raising the due process claim, an optometry board lacks the basic expertise and competence to rule on such constitutional

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[7] As recognized in *Allen v. McCurry*, 449 U.S. at 100-01 (quoted at footnote 5, *supra*), a § 1983 action may lie where state procedural law is inadequate to allow full litigation of the constitutional claim.

issues. Accordingly, *Gibson* may be distinguished from the case at bar as involving a situation in which, consistent with *Allen v. McCurry*, it was proper for a federal court to assume jurisdiction under § 1983.

Petitioners also cite to *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S.Ct. 2506 (1989), and *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), but those cases addressed issues very different from that raised here. In the former case, the same party brought two actions, one in federal court and one in state court, to contest the validity of a city council's utility rate order. This Court held that the district court erred in abstaining, noting that "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." 109 S.Ct. at 2520. Without doubt, the quoted rule of law is correct, but it does not address the ripeness question raised in this case.

In *Dayton*, this Court merely reaffirmed the accepted proposition that "a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy." 477 U.S. at 625 n.1 (citation omitted). Again, the case is inapposite and has no bearing upon the issue raised in this case.[8]

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[8] In addition to citing to these cases, Petitioners also argue that the lower courts' ripeness rulings require an exhaustion of remedies which is not required for a § 1983 action. *See Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982). In making this argument, however, Petitioners are confusing the doctrines of ripeness and exhaustion. While the former "rests on the

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In sum, the courts below acted appropriately and reasonably in dismissing Petitioners' complaint on ripeness grounds, and that dismissal was consistent with the decisions of both this Court and other lower federal courts. Before being heard to complain that they have suffered a deprivation of due process in the state courts, Petitioners must be required to present that claim to the state courts. Unless and until that claim is presented and denied, Petitioners should not be permitted to complain in a federal court that they have been deprived of their due process rights.

2. The decisions of the lower courts are also affirmable on abstention grounds.

Because of the ruling on the ripeness issue, both of the courts below declined to consider the merits of Respondents' assertion that abstention was appropriate under the principles of comity and federalism embodied in the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). In assessing the merits of this petition, however, this court

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ground that further state proceedings may forestall an injury that is only anticipated, or may change the nature of the issue presented." 13A C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure*, § 3521.1, at 126-27 (2d ed. 1984), the latter presumes the existence of the injury and seeks to determine the appropriate forum for redress. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985). In this case, Petitioners must raise their due process challenge in the state court, not as a remedial measure, but as a means of clothing the due process issue with the finality necessary to a ripened federal court claim.

should consider the fact that the *Younger* doctrine provides an independent and fully justifiable basis for affirming the actions of the courts below. Hence, there is no compelling reason for this Court to grant certiorari.

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

Id. at 43. In *Younger*, this Court gave expression to this general policy and held that a federal court could not enjoin a state court criminal action. Consistent with the vital considerations of comity and "Our Federalism" upon which that decision was based, this Court has extended the doctrine of *Younger* to bar interference with some civil proceedings.[9] Ultimately, in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), this court delineated a three-pronged test for determining whether *Younger* abstention is appropriate in a civil case.

> [A]bstention is appropriate in favor of a state proceeding if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions.

In this case, there is an ongoing state judicial proceeding (*Amerada Hess*). Thus, the question is whether the second and third prongs of the *Middlesex* test are satisfied. They are.

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[9] *Trainor v. Hernandez*, 431 U.S. 434 (1977) (civil action seeking the return of wrongfully received welfare payments); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceeding); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (civil nuisance proceeding).

a. Vital state interests are implicated.

(1) Alaska's interest in oil as a vital economic resource.

Oil revenues play a paramount role in the governance of Alaska. With over 80 percent of general fund revenues derived from oil production taxes and royalties, income from the production of oil constitutes the primary source of State revenue. It is this money which funds state government in all its facets and permits it to perform its basic functions.

In granting Alaska's admission to the Union, Congress expressly recognized Alaska's special interest in its royalties. Traditionally, Congress had limited statehood land grants to non-mineral lands, retaining federal ownership of commercially valuable mineral properties. *Trustees of Alaska v. State*, 736 P.2d 324, 333 (Alaska 1987), *cert. denied*, 486 U.S. 1032 (1988). In considering statehood for Alaska, however, some in Congress voiced the objection that "the territory was economically immature and would be unable to support a state government." *Id.* at 335. To respond to this objection, Congress took the unprecedented step of granting to the new state over 100 million acres of land with the attendant mineral rights. Alaska Statehood Act, § 6(a) and (b), 48 U.S.C. § 21. "The intent of Congress was, of course, to provide the new state with a solid economic foundation." *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1016 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980). The "primary purpose" of this land grant was "to ensure the economic and social well-being of the new state." *Trustees of Alaska v. State*, 736 P.2d at 335. *See*

also Udall v. Kalerak, 396 F.2d 746, 749 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969). In conformity with Congress' express recognition of the importance of oil revenues for Alaska, this Court should find that the oil royalties at issue in *Amerada Hess* implicate a vital state interest within the meaning of *Younger*.[10]

(2) Alaska's interest in the integrity of its judiciary.

Alaska has an equally important interest in the integrity and fairness of its judicial system, and this action directly challenges that interest. As this Court recognized in *Huffman v. Pursue, Ltd.*, 420 U.S. at 604,

> [I]nterference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference . . . can readily be interpreted 'as reflecting negatively upon the state courts' ability to enforce constitutional principles.' [Citations omitted.]

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[10] There exists a strong federal policy of nonintervention in state revenue matters. This policy is embodied in the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits a federal court from issuing injunctions or ordering other equitable relief which suspends or restrains the assessment, levy, or collection of any state tax. *California v. Grace Brethren Church*, 457 U.S. 393, 407-11 (1982). Though this act does not technically apply to this case because the royalties in issue in *Amerada Hess*

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By this action, Petitioners threaten more than that interference with the state judiciary which always accompanies an attempt to enjoin a pending state court action. Petitioners' due process claim directly impugns the fairness and integrity of the Alaska Judicial system; it impugns the state court's ability to decide constitutional questions and to safeguard basic constitutional rights. The importance of the state interest implicated is great, and abstention is appropriate.[11]

b. The petitioners have adequate opportunity to raise their constitutional claim.

The procedures available in the state court accord Petitioners ample opportunity to present federal claims.

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are not taxes per se, the policy behind the act applies with equal force to require federal court abstention. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 103 (1981); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 525 n.33 (1981).

[11] *Ciaffoni v. Supreme Court of Pennsylvania*, 550 F. Supp 1246 (D.Pa. 1982), *aff'd*, 723 F.2d 896 (3d Cir. 1983), is directly on point. There, the plaintiffs brought a § 1983 action, alleging that they were denied a fair trial and impartial appellate review by reason of the malevolence, conflicts of interest, and bias of present and past members of the state judiciary. The district court dismissed the case on a number of grounds, including *Younger* abstention. In so ruling, the court found the requisite important state interest, stating, "[T]here can be no doubt that the state courts have a genuine interest in considering and resolving allegations of bias and prejudice . . . ." *Id.* at 1251. *See also Cadena v. Perasso*, 498 F.2d 383 (9th Cir. 1974) (court abstained under *Younger* in case challenging judge's failure to disqualify himself).

Apart from Alaska Statute § 22.20.020, which establishes a procedure for disqualifying judges for cause, Petitioners may assert their due process claim by motion in the state court.[12]

The fact that Petitioners' claim goes to the bias of the state court does not obviate the adequacy of these procedures. As this Court noted in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 628 (1986),

> [W]e have repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.' [Citation omitted.]

See also Flangas v. State Bar of Nevada, 655 F.2d at 950; *Dostert v. Neely*, 498 F. Supp. at 1150. Similarly, as discussed above, this Court in *Pennzoil Co. v. Texaco, Inc., supra*, addressed the issue raised here in a broader context and held that comity required deference to pending state court proceedings where the party bringing the federal suit had made no effort to utilize available state court procedures to raise its constitutional claim.

Consistent with the holdings of these cases, the available state court procedures do allow Petitioners adequate opportunity to raise their due process claim. Abstention

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[12] Petitioners argue that such procedures are inadequate since all state court judges are subject to disqualification, but they do not refute the fact that they would be free to assert a blanket motion, challenging the entire Alaska judiciary on due process grounds. Petitioners may also file a like motion challenging the competence of all Permanent Fund dividend recipients to serve as jurors.

under *Younger v. Harris*, therefore, provides an alternative basis for upholding the decision of the lower courts.

B. Petitioners' Due Process Claim Lacks the Merit to Justify Present Review by this Court.

In assessing the merits of this petition, this Court should also give some consideration to the merits of Petitioners' underlying claim of a due process deprivation. While Respondents do not dispute Petitioners' right to raise their due process claim in the state court, they do dispute the assertion that that claim is of sufficient merit to justify this Court's present review of the matter.

Properly, the precedents of this Court establish a litigant's due process right to an impartial and unbiased tribunal. *E.g., Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam); *Tumey v. Ohio*, 273 U.S. 510 (1927). In contrast to these cases, however, the financial interest alleged in this case is not sufficiently substantial to support a finding of a due process violation.[13] *See Gibson v. Berryhill*, 411 U.S.

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[13] In *Tumey*, a village mayor's only compensation for sitting as a judge in prohibition cases was the $12 fee which was paid to him only upon conviction of the defendant. Over an eight month period, the mayor received $696 (in 1920's dollars) for serving as a judge. *Connally* involved a justice of the peace who was virtually in the business of selling search warrants. His only income was derived from the $5 fees he was paid upon issuing warrants; within the previous few years he had issued "some 10,000 warrants"; and he testified that in deciding whether to issue a warrant, he considered the fee which would be paid to him. 429 U.S. at 246 & n.3.

at 579 (those with "substantial" pecuniary interests should not adjudicate disputes); *Tumey v. Ohio*, 273 U.S. at 523 (same).

Petitioners alleged in their complaint below that the recovery of all of the damages sought by the State in *Amerada Hess* would result in an ultimate $2.6 billion recovery by the State, which would yield an eventual $70 increase in the annual Permanent Fund dividend. This allegation was based on the claims that: 1) the State would recover one billion dollars in damages for the underpayment of past royalties; 2) the theory of that damage award would entitle the State to an additional one billion dollars in royalties on future oil production, and 3) the damage award would entitle the State to another $600 million in price adjustments on royalty oil already sold by the State itself. Even assuming these numbers to be correct,[14] Petitioners' due process claim is subject to considerable doubt as a matter of law.

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[14] With respect to the damages directly at issue in *Amerada Hess*, Petitioners' numbers are based on an inaccurate characterization of a state document which estimated the value of pending State oil royalty *and tax* claims. In fact, based on expert reports completed subsequent to the initiation of this lawsuit, it is the State's position that Petitioners and the other North Slope oil producers owe slightly in excess of $900 million (including interest).

As to the effect of *Amerada Hess* on royalties on future production, Petitioners' estimate is highly speculative. Since some of the major North Slope oil producers have already adjusted their royalty accounting methodology, it is not clear that the verdict in *Amerada Hess* will result in any meaningful increase in future royalty payments.

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In the first place, subsequent to the filing of Petitioners' complaint, the State Legislature amended Alaska Statute § 43.23.045(b) to provide that Permanent Fund dividends would not be based on any money damages awarded to the State in *Amerada Hess*. While a portion of such money would be deposited into the Permanent Fund (as required by the Alaska Constitution), any earnings on that money would not be available for distribution as dividends. Rather, the earnings would be returned to the principal of the Permanent Fund.[15]

Additionally, it is significant that any remaining portion of the alleged dividend increase would flow neither

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Finally, with respect to the recovery of amounts owing the State pursuant to retroactive price adjustments to previous sales of royalty oil, the State calculates its entitlement to be $378 million. However, the purchasers' actual ability to pay this price adjustment is open to serious question and the money may never be collected from them.

[15] As amended, Alaska Stat. § 43.23.045(b) provides,

> Notwithstanding any contrary provision of law, each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending on June 30 of the current year and available for distribution. *However, income earned on money awarded after trial in State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District) shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund, and shall be annually deposited into the principal of the Alaska permanent fund.* [Emphasis added.]

immediately nor directly from a State victory in *Amerada Hess*.[16] First, the Permanent Fund itself would be increased only upon the occurrence of future events: 1) the payment of royalties on future oil production, which well continue into the next century, and 2) the subsequent recovery of the amounts due under the *Amerada Hess* adjustment clauses, the collection of which may very will require litigation or be impossible. Second, under the statutory scheme, the full impact on dividends flowing from the deposit of these monies into the Permanent Fund would not occur until the fifth year after investment.[17] Thus, Permanent fund dividends would not be increased immediately even if the State were to win *Amerada Hess*; rather, the full impact would not be realized for decades.

Furthermore, the alleged increase in dividends is subject to additional contingencies. For example, the

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[16] As suggested by one commentator, the substantiality of an alleged financial interest should depend on the size of the interest and its remoteness or contingency. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 753 (1973). This approach has been followed by a number of lower federal courts in addressing disqualification motions made under the federal recusal statute, 28 U.S.C. § 455. *See In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980); *In re Virginia Elec. and Power Co.*, 539 F.2d 357, 383 (4th Cir. 1976); *Alaska Oil Co. v. State of Alaska*, 45 B.R. 358, 361 (D. Alaska 1985) (addressing a disqualification motion based on the interest arising out of increased Permanent Fund dividends).

[17] Under the statutory dividend formula, dividends are funded from 21 percent of the total net income from Permanent Fund investment over the past five fiscal years. Alaska Stat. § 37.13.140.

annual payment of dividends is subject to legislative appropriation, which, as evidenced by the legislature's recent action amending Alaska Statute 43.23.045(b), cannot be guaranteed. Though Petitioners argue that the payment of dividends is mandatory under state law, [Petition at 4 & n.2], the Alaska Constitution requires an annual appropriation for all state expenditures. Alaska Const. art. IX, § 7 (prohibiting the dedication of state funds). *See also* 1975 Op. Alaska Att'y Gen., No. 9; 1959 Op. Alaska Att'y Gen., No. 7. More fundamentally, the very existence of the Permanent Fund dividend program cannot be guaranteed. Unlike the Permanent Fund itself, which is established by the state constitution, the dividend program is statutory and may be altered or abolished by the legislature at any time. Again, the amendment to Alaska Statute § 43.23.045(b) bears this point out.[18]

Thus, the basic merit of Petitioners' due process claim must be questioned. Contrary to Petitioners' claim, the Alaska judge and jurors will not have an interest in the outcome of *Amerada Hess* sufficient to justify their disqualification. Accordingly, Petitioners will not suffer a deprivation of due process in the state court, and there is no need for this Court to exercise its discretionary jurisdiction to safeguard Petitioners' constitutional rights.

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[18] On another front, Alaska Governor Steve Cowper is actively and publicly promoting a proposal which would place a cap on dividends and direct the remainder into an education fund. House Joint Resolution No. 13 (16th Alaska Legislature). If such a cap were imposed, no increase to the dividend would be possible.

III. CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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